A

Quintraz Sdn Bhd v Rampai Galaksi Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO 28NCC-865–10 OF 2013
WONG KIAN KHEONG JC
3 JULY 2014

C *Companies and Corporations — Winding up — Liquidator — Whether liquidator was authorised to appoint only a practising advocate and solicitor, and not a law firm, to assist him under s 236(1)(e) of the Companies Act 1965 ('Act') — Whether counsel who acted for petitioner in winding up proceedings could not subsequently act for liquidator of wound up company in same matter — Whether* D *such action jeopardised actual and perceived independence of liquidator and breached provisions of the Legal Profession (Practice and Etiquette) Rules 1978 — Whether court could not at same time order a wound up company to be dissolved and also order its books and records to be destroyed forthwith — Whether* E *ss 240(1) and 284(3) of the Act and r 152 of the Companies (Winding up) Rules 1972 ('WUR') read together showed such order for destruction should be made only after dissolution order had been granted — Whether WUR should be amended to enable notice of application (Form 57) prescribed under Rules of Court 2012 to be used for hearing of chamber matters in winding up court*

F The High Court wound up the respondent on the petitioner's application and appointed a liquidator for the company. Six months later, by notice of application in Form 57 of Appendix A of the Rules of Court 2012 ('Form 57 RC'), prescribed for the hearing of chamber matters under the said Rules, the G liquidator applied for a hearing in chambers in the winding up court to appoint the law firm of Messrs Ephraim & Assoc to represent him in the application (prayer 1) and obtain orders that he be released as liquidator for the respondent (prayer 2); that the respondent be dissolved (prayer 3) and that the respondent's books and records be destroyed forthwith (prayer 4). At the hearing of the H winding up petition, the petitioner was represented by Pamela Ephraim from Messrs Ephraim & Assoc. At the hearing of the instant application, Ms Ephraim informed the court that the respondent had no funds to appoint counsel and that her client, the petitioner, had consented to her acting for the liquidator in the application.

I **Held**, granting prayers 2 and 3 and disallowing prayers 1 and 4:

(1) The winding up court could only authorise a liquidator to appoint a practising advocate and solicitor to assist him under s 236(1)(e) of the Companies Act 1965 ('Act'). That section did not envisage the

appointment of a law firm as was applied for in prayer 1. Also, the necessity for an order allowing a liquidator to appoint counsel to assist him was to ensure the liquidator did not have to personally bear counsel's fees and that such fees could be paid out of the assets of the wound-up company. However, the respondent in this case had no assets, let alone funds to pay the fees of proposed counsel. Hence, there was no necessity for prayer 1 (see paras 14 & 16(c)).

(2) A court-appointed liquidator was an officer of the winding up court. Judicial officers should be independent and be perceived to be so. If the court allowed the liquidator to appoint the petitioner's counsel to assist him in the same liquidation, this might jeopardise both the actual and perceived independence of the liquidator (see para 16(a)).

(3) It was incompatible with the best interests of administration of justice within the meaning of the second limb of r 5(1) of the Legal Profession (Practice and Etiquette) Rules 1978 ('LPR') for Pamela Ephraim to act for both the petitioner and the respondent in the same matter. Under r 5(b)(ii) of the LPR, even if a party consented to his/her counsel acting for the opposing party, counsel still should not act if it would be embarrassing. Counsel should not accept a brief if he/she would be embarrassed (r 4 of the LPR). In the course of the winding up, the petitioner's counsel would have received confidential information from the petitioner. If the same counsel were to act for the respondent, he/she might be embarrassed within the meaning of the r 3(a) and (b)(i) of the LPR and it would be difficult for counsel to maintain his/her professional independence (see para 16(b)).

(4) Prayer 3, and, consequently, prayer 2, were granted because it was shown that the respondent had no assets; there was no evidence the respondent owed money to other creditors apart from the petitioner which was the only party that had filed a proof of debt; the liquidator had given the requisite notice that he would be applying for dissolution of the respondent; he had filed Form 75 under the Companies (Winding up) Rules 1972 ('WUR') giving notice of his intention to apply for his release and he had filed Form 77 under the WUR giving a summary of all receipts and payments in the winding up of the respondent (see paras 19–21).

(5) Prayer 4 was disallowed as the liquidator had not taken custody of the books of the respondent as was mandated of him under s 233(1) of the Act. On considering ss 240(1) and 284(3) of the Act and r 152 of the WUR, the court was of the view prayer 4 for a destruction order could not be granted simultaneously with the order to dissolve the company. Another reason was because the liquidator had not received a complete statement of affairs from the respondent's directors. If a destruction order was made and subsequently there were lawful claims by other creditors of

the respondent, it might prejudice those claims. In any case, even if the destruction order was not granted, s 284(2) of the Act allowed the liquidator to destroy the books and papers of the wound up company after the expiration of five years from the date of the dissolution (see paras 25–30).

(6) Forms 1 and 76 in the first schedule to the WUR should have been used for the filing of the instant application and not Form 57 RC because r 7(2) of the WUR provided that an application in chambers of the winding up court should be made by way of summons in Form 1 while r 149 provided that an application for a liquidator's release should be made in Form 76. Nevertheless, the court exercised its discretion under r 194(1) WUR to hear the application to save judicial time, avoid further unnecessary expense to the liquidator who, because the respondent had no assets, had already personally incurred RM6,228.16 in out of pocket expenses, and also because no substantial injustice would be caused to any party if the application was heard in the form it was filed (see paras 6, 7 & 10).

(7) In the interest of clarity and uniformity, the Rules Committee should amend the WUR to ensure Form 57 of the RC could also apply to winding up matters that were heard in chambers (see para 11).

[Bahasa Malaysia summary

Mahkamah Tinggi menggulungkan responden atas permohonan pempetisyen dan melantik pelikuidasi untuk syarikat itu. Enam bulan kemudian, melalui notis permohonan dalam Borang 57 Lampiran A Kaedah-Kaedah Mahkamah 2012 ('Borang 57 KKM'), menetapkan untuk perbicaraan dalam kamar bagi perkara-perkara di bawah Kaedah-Kaedah tersebut, pelikuidasi itu memohon satu perbicaraan dalam kamar dalam mahkamah penggulungan untuk melantik firma guaman Tetuan Ephraim & Assoc untuk mewakilinya dalam permohonan itu (permohonan 1) dan mendapat perintah agar dia dilepaskan sebagai pelikuidasi untuk responden (permohonan 2); bahawa responden dibubarkan (permohonan 3) dan bahawa buku dan rekod responden dimusnahkan (permohonan 4). Semasa petisyen penggulungan, pempetisyen diwakili oleh Pamela Ephraim dari Tetuan Ephraim & Assoc. Pada masa perbicaraan permohonan ini, Cik Ephraim memberitahu mahkamah bahawa responden tiada wang untuk melantik peguam dan bahawa anak guamnya, pempetisyen, telah bersetuju agar dia bertindak bagi pihak pelikuidasi dalam permohonan ini.

Diputuskan, memberikan permohonan-permohonan 2 dan 3 dan tidak membenarkan permohonan-permohonan 1 dan 4:

(1) Mahkamah penggulungan hanya boleh memberi kuasa kepada pelikuidasi untuk melantik peguambela dan peguamcara yang beramal

untuk membantunya di bawah s 236(1)(e) Akta Syarikat 1965 ('Akta'). Seksyen tersebut tidak termaktub pelantikan firma guaman sebagaimana dipohon dalam permohonan 1. Juga, keperluan untuk satu perintah membenarkan pelikuidasi untuk melantik peguam bagi membantunya adalah untuk memastikan pelikuidasi tidak perlu menanggung sendiri yuran peguam dan bahawa yuran tersebut boleh dibayar daripada aset-aset syarikat yang digulungkan. Walau bagaimanapun, responden dalam kes ini tiada asset, apatah lagi wang untuk membayar yuran untuk peguam yang dicadangkan. Justeru, tiada keperluan untuk permohonan 1 (lihat perenggan 14 & 16(c)).

(2) Pelikuidasi yang dilantik mahkamah adalah pegawai mahkamah penggulungan. Pegawai-pegawai kehakiman hendaklah bebas dan dianggap sebegitu. Jika mahkamah membenarkan pelikuidasi untuk melantik peguam pempetisyen untuk membantunya dalam likuidasi yang sama, ini mungkin menjejaskan kedua-dua kebebasan sebenar dan andaian pelikuidasi (lihat perenggan 16(a)).

(3) Tidak dapat dibandingkan dengan kepentingan terbaik untuk pentadbiran keadilan dalam maksud cabang kedua k 5(1) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 ('KPU') untuk Pamela Ephraim bertindak bagi kedua-dua pempetisyen dan responden dalam perkara sama. Di bawah k 5(b)(ii) KPU, walaupun satu pihak telah bersetuju dengan peguamnya bertindak untuk pihak yang menentang, peguam masih tidak patut bertindak jika ia memalukan. Peguam tidak patut menerima arahan jika dia akan dimalukan (k 4 KPU). Sepanjang penggulungan, peguam pempetisyen akan menerima maklumat rahsia daripada pempetisyen. Jika peguam sama bertindak bagi pihak responden, dia mungkin dimalukan dalam maksud k 3(a) dan (b)(i) KPU dan ia akan menjadi sukar untuk peguam mengekalkan kebebasan profesionalnya (lihat perenggan 16(b)).

(4) Permohonan 3, dan berikutnya, permohonan 2, telah diberikan kerana telah ditunjukkan bahawa responden tiada aset; tiada keterangan yang responden terhutang wang kepada pemiutang lain selain daripada pempetisyen yang merupakan satu-satunya pihak yang telah memfailkan bukti keberhutangan pelikuidasi telah memberikan notis rekuisisi bahawa dia akan memohon pembubaran responden; dia telah memfailkan Borang 75 di bawah Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('KPS') yang memberikan ringkasan semua resit dan bayaran dalam penggulungan responden (lihat perenggan 19–21).

(5) Permohonan 4 tidak dibenarkan kerana pelikuidasi tidak mengambil jagaan buku-buku responden sebagaimana dimandatkan olehnya di bawah s 233(1) Akta. Dengan mengambil kira ss 240(1) dan 284(3) Akta dan k 152 KPS, mahkamah berpendapat permohonan 4 untuk perintah pemusnahan tidak boleh dibenarkan bersekali dengan perintah untuk

membubarkan syarikat itu. Satu sebab lagi adalah kerana pelikuidasi tidak menerima penyata urusan yang lengkap daripada pengarah-pengarah responden. Jika perintah pemusnahan dibuat dan berikutnya terdapat tuntutan sah oleh pemiutang responden yang lain, ia mungkin memprejudiskan tuntutan tersebut. Dalam apa-apa kes, jikapun perintah pemusnahan tidak dibenarkan, s 284(2) Akta membenarkan pelikuidasi memusnahkan buku-buku dan kertas-kertas penggulungan syarikat selepas tamat tempoh lima tahun dari tarikh pembubaran (lihat perenggan 25–30).

(6) Borang-borang 1 dan 76 dalam jadual pertama kepada KPS patut digunakan untuk memfailkan permohonan ini dan bukan Borang 57 KM kerana k 7(2) KPS memperuntukkan bahawa permohonan dalam kamar untuk mahkamah penggulungan patut dibuat melalui saman dalam Borang 1 manakala k 149 memperuntukkan bahawa permohonan untuk pelepasan pelikuidasi patut dibuat dalam Borang 76. Namun begitu, mahkamah telah menggunakan budi bicaranya di bawah k 194(1) KPS untuk mendengar permohonan itu untuk menjimat masa kehakiman, mengelakkan perbelanjaan selanjutnya yang tidak perlu terhadap pelikuidasi yang, kerana responden tiada asset, telahpun secara peribadi menanggung RM6,228.16 untuk perbelanjaan yang tidak dirancang, dan juga kerana tiada ketidakadilan ketara boleh diakibatkan kepada mana-mana pihak jika permohonan itu telah didengar dalam boring ia difailkan (lihat perenggan 6, 7 & 10).

(7) Demi kepentingan untuk menjelaskan dan keseragaman, Jawatankuasa Peraturan hendaklah meminda KPS bagi memastikan Borang 57 KM juga boleh terpakai bagi perkara-perkara penggulungan yang didengar dalam kamar (lihat perenggan 11).]

Notes

For cases on liquidator, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1442–1501.

Cases referred to

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204, CA (refd)

GKM Amal Bhd v Bank Utama (M) Bhd [2004] 2 MLJ 12; [2004] 1 CLJ 769, CA (refd)

Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor [2001] 1 MLJ 567; [2001] 1 CLJ 844, HC (refd)

K Balasubramaniam (Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd) (in liquidation) v MBF Finance Bhd & Ors [2005] 2 MLJ 201; [2005] 1 CLJ 793, FC (refd)

Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor [1999] 4 MLJ 262, HC (refd)

Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290; [1989] 1 CLJ (Rep) 61, SC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
Maril-Rionebel (M) Sdn Bhd v Perdana Merchant Bankers Bhd and other appeals [2001] 3 CLJ 248, CA (refd)
Oriental Finance Bhd v Syarikat Seri Paroi Sdn Bhd [2003] 7 CLJ 414, HC (refd)
Paruvathy a/p Palany v Sathiasealan a/l Govindasamy [1999] 5 MLJ 151, HC (refd)
Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd [2005] 2 MLJ 74; [2004] 8 CLJ 584, HC (refd)

Legislation referred to

Company Law Review Act 1998 [AU]
Companies Act 1965 ss 218, 233(1), 236(1)(e), 239(d), 240(1), 284(3)
Companies (Winding up) Rules 1972 r 5(1)(a), (b), (c), (d), (e), (f), (g), 5(2), 194(1), Forms 1, 76
Interpretation Acts 1948 and 1967 ss 2(1)(b), 3(1), 23(1)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3(a), (b)(i), 5(1), 5(a)
Rules of Court 2012 O 1 r 2(1), (2), O 32 r 1, Form 57
Rules of the High Court 1980 O 3 r 2, O 92 r 4

Pamela Ephraim (Ephraim & Assoc) for the liquidator/petitioner.
Respondent unrepresented.
Nur Mazlinah bt Abdul Talib (Malaysia Department of Insolvency) for the official receiver.

Wong Kian Kheong JC:

INTRODUCTION

[1] The petitioner company had successfully obtained an order from this court to wind up the respondent company on 3 December 2013. Encik Wan Idris bin Wan Ibrahim had been appointed as liquidator of the respondent company ('the liquidator').

[2] At the hearing of the winding up petition, the petitioner company was represented by learned counsel, Ms Pamela Ephraim from Messrs Ephraim & Assoc.

LIQUIDATOR'S APPLICATION

[3] In notice of application dated 9 June 2014 (court encl No 11) ('the application'), the liquidator applied for the following:

(a) Messrs Ephraim & Assoc to be appointed to represent the liquidator in the application ('prayer 1');

(b) the liquidator to be released as the respondent company's liquidator ('prayer 2');

(c) the respondent company be dissolved ('prayer 3'); and

(d) the respondent company's books and records be destroyed forthwith ('prayer 4').

MODE OF APPLICATION IN CHAMBERS OF WINDING UP COURT

[4] The application is made in the format provided in Form 57, Appendix A ('Form 57 of the RC') to the Rules of Court 2012 ('the RC') as stated in O 32 r 1 of the RC.

[5] At the hearing of the application on 2 July 2014, Ms Pamela Ephraim acted for the liquidator. I will state later in this judgment on whether it is appropriate for Ms Pamela Ephraim to represent both the petitioner company and the liquidator in the application.

[6] In respect of the manner in which the application was filed, I pointed out the following matters to Ms Pamela Ephraim:

(a) the application did not concern any of the matters listed in r 5(1)(a)–(g) of the Companies (Winding up) Rules 1972 ('the WUR'). Accordingly, r 5(2) of the WUR states that the application should be heard in chambers of the winding up court; and

(b) for an application in chambers of the winding up court, r 7(2) provides that such an application shall be made by summons in Form 1 of the First Schedule to the WUR ('Form 1 of the WUR');

(c) the application prayed for the liquidator's release as the respondent company's liquidator. According to r 149 of the WUR, an application for a liquidator's release should be made in Form 76 of the First Schedule to the WUR ('Form 76 of the WUR').

[7] In view of the above specific provisions in WUR, I am of the humble opinion that Forms 1 and 76 of the WUR (and not Form 57 of the RC) should be used in the application. My view is supported by O 1 r 2(1) and (2) of the RC which reads as follows:

O1 r 2(1) *Subject to paragraph (2)*, [RC] apply to all proceedings ...

r 2(2) *[RC] do not have effect in relation to proceedings in respect of which rules have been made ... under any written law for the specific purpose of such proceedings*

(Emphasis added.)

[8] In *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290; [1989] 1 CLJ (Rep) 61, at pp 69–70, the Supreme Court did not apply the then applicable Rules of the High Court 1980 ('the RHC') in a petition under s 218 of the Companies Act 1965 ('the CA') but instead applied the WUR. Similarly, in *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor* [2001] 1 MLJ 567 at pp 571–572 and 575; [2001] 1 CLJ 844, at pp 848–849 and 852, the High Court applied the specific provisions of WUR and not the general provisions of O 3 r 2 and O 92 r 4 of the RHC.

[9] In response to my aforesaid view, Ms Pamela Ephraim replied that the High Court's registry only accepts filing of a notice of application and not a summons in chambers. Ms Pamela Ephraim further applied orally for me to exercise my discretion under r 194(1) of the WUR to proceed with the hearing of the application.

[10] I had exercised my discretion under r 194(1) of the WUR to proceed with the hearing of the application for the following reasons:

(a) no substantial injustice would be caused to any party if this winding up court proceeded with the application in the form it was filed — please see the Court of Appeal's judgments in *GKM Amal Bhd v Bank Utama (M) Bhd* [2004] 2 MLJ 12; [2004] 1 CLJ 769, at p 772, and *Maril-Rionebel (M) Sdn Bhd v Perdana Merchant Bankers Bhd* [2001] 4 MLJ 187; [2001] 3 CLJ 248, at p 265 (by Gopal JCA (as His Lordship then was));

(b) precious judicial time would be saved in proceeding with the application. As stated by Abdul Hamid Mohamad JCA (as His Lordship then was) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd v Perdana Merchant Bankers Bhd and other appeals* [2001] 3 CLJ 248, at pp 268–269, winding up petitions should be disposed of expeditiously. Following the reasoning in *Maril-Rionebel (M) Sdn Bhd*, matters which arise after winding up should also similarly be disposed of expeditiously; and

(c) according to the liquidator's affidavit in support of the application (court encl No 12), the wound up respondent company had no assets. In fact, the liquidator had to incur himself out of pocket expenses

amounting to RM6,228.16. If I had not exercised the curing provision in r 194(1) of the WUR in this case, the liquidator would have to incur more unnecessary expense.

[11] It is my hope that in the interest of clarity and uniformity, the Rules Committee should amend the WUR to ensure that Form 57 of the RC also applies to winding up matters which will be heard in chambers.

CAN PETITIONER COMPANY'S COUNSEL REPRESENT LIQUIDATOR?

[12] At the out-set of the hearing of the application, I queried Ms Pamela Ephraim as to whether it would be appropriate for her as the petitioner company's learned counsel to represent the liquidator. Ms Pamela Ephraim responded that the wound up respondent company had no funds to appoint counsel and the petitioner company had consented to her acting for the liquidator.

[13] Under s 236(1)(e) of the CA, the liquidator may, with the authority of, among others, the winding up court, appoint an 'advocate' to assist the liquidator. The word 'advocate' is not defined in CA. Hence, resort is made to the Interpretation Acts 1948 and 1967 ('the IA'). As CA has been revised under the Revision of Laws Act 1968, Part I of IA applies to CA — s 2(1)(b) of the IA.

[14] Section 3 of Part I of the IA provides that an 'advocate' means a person entitled to practise as an advocate and solicitor under the applicable law. Based on the meaning of the word 'advocate' in s 3 of the IA, the winding up court may only authorise a liquidator to appoint a practising advocate and solicitor under s 236(1)(e) of the CA. It is clear that s 236(1)(e) of the CA does not envisage the appointment of a law firm as applied for in prayer 1.

[15] In *Oriental Finance Bhd v Syarikat Seri Paroi Sdn Bhd* [2003] 7 CLJ 414, at pp 416 and 430, the High Court allowed a firm of solicitors to be appointed under s 236(1)(e) of the CA to assist a liquidator. There was however no discussion in that case in respect of the meaning of the word 'advocate' in s 236(1)(e) of the CA.

[16] I have refused prayer 1 for the following reasons:

(a) it is trite law that a court-appointed liquidator is an officer of the winding up court — Court of Appeal's judgment in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, at p 207. Judicial officers should be independent and perceived to be so. Accordingly, if the winding up court allows a liquidator to appoint the petitioner's counsel

to assist that liquidator in the same liquidation, this may jeopardise both the actual and perceived independence of that liquidator;

(b) the following ethical considerations operate against the granting of prayer 1:

(i) in the course of winding up the respondent company, the petitioner company's learned counsel would have confidential information from the petitioner company. If the petitioner company's learned counsel now acts for the wound up respondent company, she may be embarrassed within the meaning of r 3(a) and (b)(i) of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR');

(ii) if the petitioner company's learned counsel represents the wound up respondent company, it would be difficult for her to maintain her professional independence as required by the first limb of r 5(a) LPR (please see the High Court case of *Paruvathy a/p Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151, at p 160);

(iii) it would be incompatible with the best interest of administration of justice within the meaning of the second limb of r 5(1) LPR for Ms Pamela Ephraim to act for both the petitioner and the wound up respondent company in the same matter.

> Rule 5(b)(ii) of the LPR states that even if a party consents in writing to his or her counsel acting for the opposing party, that counsel still cannot act if that counsel is embarrassed. As stated earlier, Ms Pamela Ephraim may be embarrassed in the context of r 3(a) and (b)(i) of the LPR; and

(iv) a counsel should not accept a brief if he or she would be embarrassed — r 4 LPR (*Paruvathy*, at p 160); and

(c) an order of the winding up court for a liquidator to appoint a counsel under s 236(1)(e) of the CA is necessary to ensure that the liquidator does not have to bear personally that counsel's fees and such fees can be paid from the assets of the wound up company — please see the High Court's judgment in *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262, at p 267. As disclosed in the application, the wound up respondent company had no assets, let alone funds to pay the remuneration of the proposed counsel of the respondent company. Hence, there is no necessity for prayer 1.

SHOULD WOUND UP RESPONDENT COMPANY BE DISSOLVED?

[17] I propose to deal with prayer 3 before deciding prayer 2. This is because whether the lquidator can be granted a release will depend on, among others, whether the wound up respondent company can be dissolved under s 239(d) of

A the CA. If the wound up respondent company should not be dissolved, I would be reluctant to grant a release to the liquidator as he should complete the liquidation process until dissolution of the respondent company.

B **[18]** Our CA is based on Australian legislation but it is to be noted that in Australia, the dissolution procedure for companies has been replaced by deregistration of companies (by the Company Law Review Act 1998 of Australia).

C **[19]** In this case:

(a) the wound up respondent company had no assets. As such, s 239(a) of the CA (requiring the liquidator to realise all the assets of the wound up respondent company) does not apply here as in *Oriental Finance Bhd*, at p 431, and *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584, at p 608;

D

(b) the Liquidator had given notice in a national English daily newspaper of the winding up of the respondent company and for the creditors of the respondent company to file proof of debt ('POD') with the lquidator. The liquidator had only received a POD from the petitioner company. Other than the respondent company's debt due to the petitioner company, there is no evidence before me that the respondent company owed money to other creditors;

E

F (c) the liquidator had given notice of final meetings of the respondent company's creditors and contributories in a national English daily newspaper and the Federal Government's *Gazette*. Final meetings of the respondent company's creditors and contributories had been held wherein the liquidator had informed the following:

G

(i) the respondent company had no assets;

(ii) only the petitioner company had filed a POD; and

(iii) the liquidator would apply for a dissolution of the respondent company;

H

(d) the liquidator had filed Form 75 of the WUR giving notice of his intention to apply for release as required by r 149 of the WUR; and

(e) pursuant to r 149 of the WUR, the liquidator had filed Form 77 of the WUR, a summary of all receipts and payments in the winding up of the respondent company.

I

[20] Based on the above reasons, I have no hesitation to grant prayer 3.

CAN LIQUIDATOR BE RELEASED?

[21] The reasons supporting the dissolution of the respondent company, in my view, also support prayer 2 and I so order.

SHOULD THE RESPONDENT COMPANY'S BOOKS BE DESTROYED FORTHWITH?

[22] The following statutory provisions are relevant to prayer 4:

> Section 284(1)
>
> Where a company is being wound up all books and papers of the company and of the liquidator that are relevant to the affairs of the company at or subsequent to the commencement of the winding up of the company shall as between the contributories of the company be prima facie evidence of the truth of all matters purporting to be therein recorded.
>
> Section 284(2)
>
> *When a company has been wound up the liquidator shall retain the books and papers referred to in subsection (1) for a period of five years from the date of dissolution of the company and at the expiration of that period may destroy them.*
>
> Penalty: Two thousand ringgit.
>
> Section 284(3)
>
> *Notwithstanding subsection (2), when a company has been wound up the books and papers referred in subsection (1) may be destroyed within a period of five years after the dissolution of the company —*
>
> (a) *in the case of a winding up by the Court, in accordance with the directions of the Court*;
>
> rule 152(2) of the WUR
>
> The Court may, at any time during the progress of the liquidation, on the application of the liquidator or the Official Receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of liquidation, may be sold, destroyed or otherwise disposed of.
>
> (Emphasis added.)

[23] Section 4(1) of the CA gives a wide definition of the word 'books'.

[24] Ms Pamela Ephraim cited *Oriental Finance Bhd*, at p 416 and 431–432, in support of prayer 4. In *Oriental Finance Bhd*, the High Court ordered the wound up company's books to be destroyed forthwith after making an order to dissolve that company.

[25] At the hearing of the application, upon my query, Ms Pamela Ephraim confirmed that the liquidator had not taken into his custody the books of the

wound up respondent company as mandated of him under s 233(1) of the CA (please see Federal Court's judgment in *K Balasubramaniam (Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd) (in liquidation) v MBF Finance Bhd & Ors* [2005] 2 MLJ 201; [2005] 1 CLJ 793, at p 805).

[26] In view of the fact that the liquidator had not taken into his custody the books of the wound up respondent company, I decline prayer 4. There is no benefit to any party, including the liquidator, for the winding up court to order destruction of the respondent company's books. There is also no detriment to the liquidator if prayer 4 is refused as the liquidator has not taken possession of the books of the wound up respondent company. In other words, the liquidator is not exposed to financial loss by keeping the respondent company's books.

[27] Upon a consideration of ss 240(1) and 284(3) of the CA as well as r 152 of the WUR, I am of the following opinion:

(a) according to s 240(1) of the CA, a company is dissolved from the date of dissolution ordered by the winding up court ('dissolution order');

(b) the wording of s 284(3) of the CA ('destroyed within a period of five years after the dissolution of the company') envisages an order of destruction by the winding up court ('destruction order') *after* the date of the dissolution order. In other words, the destruction order cannot be effective at the same time as the dissolution order as applied for in prayer 4; and

(c) r 152(2) of the WUR confers a wide power on the winding up court to make a destruction order 'at any time during the progress of the liquidation'. Such a general provision should not apply in a specific situation when a dissolution order has been sought and obtained. When a dissolution order is granted, the specific provision of s 284(3) of the CA should prevail over the general provision of r 152(2) of the WUR in accordance with the canon of statutory construction *generalibus specialia derogant* (please see the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, at p 758–759). Furthermore, a subsidiary legislation such as r 152(2) of the WUR should not be inconsistent with its parent Act of Parliament, namely CA — s 23(1) of the IA.

[28] In light of my considered view of ss 240(1) and 284(3) of the CA as well as r 152 of the WUR, prayer 4 cannot be granted simultaneously with the dissolution order.

[29] There is a third reason to decline Prayer 4. In this case, the liquidator had received an incomplete statement of affairs ('SOA') from the respondent company's directors. If the winding up court makes the destruction order and

if subsequently, there are claims by creditors of the respondent company other than the petitioner company ('other creditors'), I am concerned that the destruction order may prejudice the lawful claims of the other creditors.

[30] Lastly, even if the destruction order is not granted, the liquidator may destroy the respondent company's books (which he has yet to take custody of) after five years from the date of the dissolution order — s 284(2) of the CA.

ORDERS OF WINDING UP COURT

[31] In the upshot, I grant prayers 2 and 3. I declined prayers 1 and 4. As the wound up respondent company has no assets, I make no order as to costs of the application.

Prayers 2 and 3 granted and prayers 1 and 4 disallowed.

Reported by Ashok Kumar